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SUBJECT: AUSTRALIA GROUP: GERMANY TO SUBMIT PROPOSAL FOR  
PARIS PLENARY

11. (U) THIS IS AN ACTION REQUEST. PLEASE SEE PARA 4.

12. (SBU) On August 11, MFA Export Control Division Deputy Office Director, Markus Klinger, provided EconOff with a German proposal for Australia Group (AG) "Best Practice Guidelines for Implementing End-Use Controls." Germany intends to submit this proposal at the Australia Group (AG) Plenary next month in Paris. Klinger requested USG feedback on this proposal before the plenary and, if possible, by the end of the week -- even if it is informal feedback. Klinger mentioned that this proposal is very similar to "end-use best practices" already adopted by the Wassenaar Arrangement, the Nuclear Suppliers Group, and the Missile Technology Control Regime.

13. (SBU) Begin Text of German Non-Paper:

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AUSTRALIA GROUP

German Proposal

for

Best Practice Guidelines for Implementing End-use Controls  
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The principal objective of Australia Group participants is to use national licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment do not contribute to the spread of chemical and biological weapons (CBW).

The Group agreed to achieve this on the basis of the Australia Group Guidelines, recognizing inter alia the need for harmonizing participating countries' national export licensing measures.

The question of end-use is crucial in the endeavor to limit the risk of proliferation of weapons of mass destruction. The goal of end-use controls is to help ensure that transfers of AG controlled items, equipment and technology actually reach and remain with the intended end-user and are not/not used for CBW activities. Australia Group participants agreed in their Guidelines to especially evaluate the appropriateness of the stated end use and pay special attention to the assessment of assurances of the end user when judging on export control applications. The Australia Group Guidelines further serve this objective of the Group by stating that Australia Group participants implement the Guidelines in accordance with the Group's agreed common approach on End User Undertakings (AG/Dec93/ExC/Chair/48).

Furthermore, the topic and importance of end-use controls is addressed in different Australia Group agreed documents on Chemical & Biological Export Control and in Australia Group Statements. Reference Papers and Best Practice Guidelines, such as the Framework of Effective Licensing Arrangements (AG/Dec92/ExC/Chair/32), the Common Approach to Controls of Exports to Distributors (AG/May06/ExC/D/28) and the Awareness Raising Guide (AG/Nov03/ExC/Chair/105).

#### Purpose of Proposal

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The purpose of the attached proposal of Best Practice Guidelines for Implementing End-use Controls is to help Australia Group participants to implement effective and transparent end-use controls on a case-by-case basis. They contain an Annex with a reference list of possible basic and additional elements of end-use controls. The proposed Guidelines aim at drawing a common approach that serves Australia Group participants to implement effective end-use controls in a flexible way accommodating all agreed Australia Group documents related to this topic, and in accordance with their national laws and practices.

The Best Practice Guidelines are based on the Australia Group Guidelines, Australia Group consensus decisions, the Australia Group Enforcement Officers Manual, on the results of the Berlin Export Control Seminar 2006 entitled "End-use Verification - A Core Element of Export Control-" and on Germany's own experience in this area.

BERLIN 00000992 002 OF 006

#### Recommendation for Plenary

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In order to facilitate end use controls as a crucial element of export controls, Germany proposes the following decision:

Australia Group participants agree on the "Best Practice Guidelines for Implementing End-use Controls" as an outline to implement end-use controls in a flexible way in accordance with national laws and practices."

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#### Proposal

Australia Group

#### Best Practice Guidelines for Implementing End-use Controls

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The Australia Group Guidelines serve the objective of the Group to limit the risks of proliferation and terrorism involving chemical and biological weapons (CBW) by controlling tangible and intangible transfers that could contribute to CBW activities by states or non-state actors.

Australia Group participants thus reaffirm to maintain a flexible and effective system of controls that help ensure that AG controlled items, equipment and technology reach the intended end-user and are not used for CBW (end-use controls). The proper evaluation of each individual export license application is important to minimize the risk of undesirable diversion. Based on an intelligent risk management, the sensitivity of such export transactions should be analyzed case by case. Factors for consideration include information about the consignee (including the country of consignment), the reliability of the parties involved in the transactions, the nature of the AG-controlled items to be transferred and their stated end-use. The

following Guidelines are taken into consideration when implementing end use controls:

¶1. The underlying principle for end-use controls is that sensitive cases should be subject to a greater degree of scrutiny than less sensitive cases. Australia Group participants therefore can combine basic and additional elements (as set out in the reference list to theses Best Practices Guidelines) depending on the risk assessment. Basic elements should always be applied.

¶2. There are three phases of an export when dealing with end-use controls: the pre-license phase, the application procedure and the post-license phase. There is a close interrelationship between the phases.

¶3. When selecting which elements from the reference list to use, account must be taken of the different questions that will arise depending on the nature of the items to be exported.

¶4. All elements of the end-use controls process should be linked together to form a coherent initiative that would include industry outreach programs, close co-operation between licensing and enforcement authorities and exporter compliance audits. These should be supplemented by proportionate and dissuasive penalties for non-compliance. While end-use certificates are an essential element of end-use controls they are not a substitute for a full risk assessment involving both licensing authorities and the exporter.

¶5. Australia Group participants may review progress on implementation of this Best Practice Guide as appropriate.

#### Annex: Reference List

There are three phases of an export to be distinguished when dealing with end-use controls: the pre-license phase, the application procedure and the post-license phase. There is a close interrelationship between the phases. To control end-use most effectively, the following basic elements within the three phases of an export should be applied while

BERLIN 00000992 003 OF 006

additional elements can be applied depending on the risk assessment in each individual case:

#### ¶1. Pre-License Phase

End-use controls need to be considered in the run-up to the submission of an export license application by the exporter. Competent authorities need to raise the exporter's awareness for legal requirements and his share of the responsibility for controlling sensitive items. Thus, a key element for the exporter is an efficient and transparent Internal Compliance Program (ICP), for which a responsible person should be nominated. For their part, the licensing authority should ensure that sufficient information is available on national legislation, international commitments and administrative procedures to enable exporters to understand what their obligations are. Governments also need to ensure that all agencies involved in the licensing process at national level share relevant information (e.g. on end-users).

The following basic elements should be applied in this phase. They are to be distinguished as to be related to the competent authority or related to the exporter:

a) Basic Elements for competent Authorities (Pre-License Phase)

- Awareness-Raising measures, i.e. providing information on export control and exporters' duties e.g.:
  - web sites
  - participation in and/or organization of industry outreach programs
  - written guidance material to explain laws, regulations and procedures

and as described in the Australia Group Awareness Raising Guide and recommended in the Australia Group Framework for Effective Licensing Arrangements for CBW- relevant Export Controls

- Establishment of points of contact to exchange information between competent authorities inside a Participating Government's administration (as recommended in the Australia Group Framework for Effective Licensing Arrangements for CBW- relevant Export Controls, too.)

- Evaluation of Information i.e. about proliferation and terrorism involving CBW, including any proliferation or terrorism-related activity, or about involvement in clandestine or illegal procurement activities, capabilities and objectives of the chemical and biological activities of potential recipient states.

#### b) Basic Elements for Exporter (Pre-License Phase)

- Internal Compliance Program (ICP), i.e. to establish export control compliance standards within a company, which may include, depending on the structure of the company as well as other specific circumstances:
  - nomination of a person at senior management level (to be responsible for export control compliance)
  - selection of competent staff members to oversee day-to-day compliance with relevant export control regulations
  - sample quality checks of staff work
  - training, and periodic refresher training, of staff in export control law and procedures.

- Providing transparency on end user as part of ICP by confirming as far as possible end-use/final destination through use of all available information. Indications for sensitive cases include:
  - customer's identity or existence cannot be verified
  - customer reluctant to offer information about the end-use of the items or of other relevant data
  - customer lacks of skills, technical knowledge or equipment for the stated end-use of the items
  - quantities or performance capabilities of the goods significantly exceed the quantities or performance capabilities usually required for the stated end-use
  - unusually favorable payment terms
  - unusual shipping/packaging/labeling arrangements
  - there are requests for excessive spare parts or lack of interest in any spare parts usually required

BERLIN 00000992 004 OF 006

- routine installation, training or maintenance services declined
- customer has unusual on-site security standards
- any other unusual business behavior.

- Exporter's duty to keep relevant documentation for a set period of time, esp. on the points mentioned above

The following additional elements may be applied in this phase to facilitate end use controls according to the risk assessment of the individual case. They are to be distinguished as to be related to the competent authority or related to the exporter, too:

#### a) Additional Elements for competent Authorities

(Pre-License Phase)

- Maintenance of end-user "red-flags" or other early warning systems and destination country profiles
- Manuals and training for licensing officers on processing license applications for exports to sensitive countries (as e.g. recommended in the Australia Group Framework for Effective Licensing Arrangements for CBW - relevant Export Controls
- Outreach-programs to non-AG Partners (as e.g. described and foreseen in the AG Action plan for the Asia-Pacific region or the AG Regional Action Plan for the Balkans)
- Establishment of points of contact where information can be exchanged among Australia Group participants (e.g. on suspicious or unusual transactions) as described in the AG document complementary information sharing (AG/May03/Pol/Aus/2).

b) Additional Elements for Exporters (Pre-License Phase)

- Seeking advice from and rendering information to competent authorities on business contacts, to sensitive end-users or in unclear or suspect cases.

12. Application procedure  
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The application assessment procedure during the licensing process itself covers most measures that need to be taken into consideration from an end-use control perspective. Here, special attention should be given inter alia to verify that the data was provided with the export license application, and ultimately to come to a final decision.

The following basic elements to facilitate end use controls should be applied in this phase. They again are to be distinguished as to be related to the competent authority or related to the exporter:

a) Basic Elements for competent Authorities (application procedure)

- Plausibility check on the information provided, assessing among others the following:
  - technical aspects (e.g. data sheets, technical specifications and reference lists supplied, plausibility of quantities)
  - internal knowledge and other information, esp. with regard - but not limited - to the end-use/end-user
  - end-use and other documents submitted in support of the application
  - reliability of the persons involved in the transaction (exporter, consignee, end-user and others)
  - risk analysis

Additionally, all end-use related and other criteria of the non-exhaustive list of factors as described in the Guidelines of the Australia Group should be considered.

- Consideration of denial notifications inter alia according to all agreements related to the "Non Undercut Policy" of the AG (see also recommendations in the Australia Group Framework for Effective Licensing Arrangements for CBW - relevant Export Controls point 4)

- Consideration of information about proliferation and terrorism involving CBW and other, related to the individual case.

BERLIN 00000992 005 OF 006

b) Basic Elements for Exporter (application procedure)

- Presentation of a factually complete license

application form, including all necessary supporting documentation. Minimum information:

- exporter
  - consignee/end-user/purchaser/others involved in the transaction
  - description and specification of goods
  - description of end use
  - signature of applicant (verifiable), and other contact information
- Submission of end-use statements containing minimum information as described in the Australia Group Common Approach to End user Undertakings.

The following additional elements may be applied and required in this phase according to the risk assessment of the individual case. They are to be distinguished as to be related to the competent authority or related to the exporter:

a) Additional Elements for competent Authorities (application procedure)

- Liaison with intelligence services
- Inter-ministerial consultation on export transactions
- Consult with other national or foreign competent authorities via points of contact
- Take into account the capability of importing country to exert effective export controls
- Apply special procedures in special cases:
  - Including conditions / obligations to a license (e.g. submission of governmental or private Delivery Verification Certificates (DVC))
  - Check authenticity of governmental or private end-use certificates
  - Pre-license check to confirm existence of the end-user and bona fide need for controlled items
  - Special attention to export licenses involving distributors applying the non exhaustive list of elements as described in the Australia Group common approach to controls of exports to distributors (AG/May06/ExC/D/28).

b) Additional Elements for Exporters (application procedure)

- Thorough explanation of facts
- Presentation of additional supporting documentation in support of export license application:
  - company's profile with detailed information on consignee/end-user
  - project description
  - information on service contracts or acceptance reports
  - Letter of credit, L/C
- Submission of separate confirmation of specific data by person responsible for exports
- Presentation of end-use certificates with additional elements as specified by the competent authority.

### 13. Post-License Phase

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This phase is dedicated to confirm that the rationale for granting an export license was correctly based. This happens in particular through an exchange of information among those government agencies involved in the licensing process as well as through checks made by the exporter. Information exchange may also include information from other Australia Group participants. In addition, government or private delivery verification certificates could be obtained and checked as well as compliance with any other requirements placed on the end-user could be monitored.

The following basic elements should be applied and ought to be considered important in this phase. Again, these elements are to be distinguished as to be related to the competent authority or to be related to the exporter:

a) Basic Elements for competent Authorities (Post-License Phase)

- Control of actual exports (e.g. annotate export license to show actual exports made (by customs/exporter))

BERLIN 00000992 006 OF 006

- Start of information exchange process about denied applications (e.g. denial exchange with Australia Group participants)

- Co-operation and information exchange between authorities and with other Australia Group participants (i.e. between the licensing and enforcement authorities; where appropriate with other Australia Group participants)

- Enforcement through regular compliance checks on exporters (e.g. as described in the Australia Group enforcement officers manual and in the Australia Group Best Practices to implement controls on intangible technology transfers (ITT))

- Have in place and apply if necessary proportionate and dissuasive penalties to deter and to sanction infringements of the regulations.

b) Basic Elements for Exporter (Post - License Phase)

- Records associated with license applications must be retained for a set minimum period

- Encourage the reporting of suspicious activity or evidence of diversion or misuse of item(s) to authorities

The following additional elements may be applied in this last phase according to the individual case. They are to be distinguished as to be related to the competent authority or related to the exporter:

a) Additional Elements for competent Authorities (Post-License Phase)

- Monitoring end-user obligations and exporter obligations and acting where they are in default of those obligations

- Monitor actual use of export licenses issued to detect/prevent fraud and or other abuse of the license

- Governmental Post Shipment Inspection (1)

- Export reports / import reports, i.e. exchange of information between the competent authorities of exporting country and the country of consignment to reveal unlicensed transfers or attempts of diversion.

- Co-operation and information exchange where appropriate with other Australia Group participants

- Monitoring re-export conditions, where resale by the consignee is subject to a reservation from the original exporting state.

b) Additional Elements for Exporters (Post - License Phase)

- Submission of Delivery Verification Certificate (DVC) (government or private verification certifying delivery or reception of the goods)

- Give export notice (a requirement that could be placed on industry to report to their authorities on potential future exports)

- Private Post-Shipment Inspection (1) (Contracted provision of operational or maintenance services at the end-user's facilities or other verification mechanisms undertaken by the exporter)

- Publication of collateral clauses towards consignee: as a transparency and compliance measure the exporter has to inform the consignee about any legal or administrative condition under which, the license was granted.

(1) A possible additional element is the so-called governmental or private post-shipment inspections at the end-user's site, which may be applied on a mutually voluntary

basis. Permanent end-use safeguards in accordance with the provisions can also not be guaranteed by regular on-site inspections. Therefore, the additional benefit of post shipment inspections is to gain information for future licensing procedures.

End Text of German Non-Paper.

¶4. (SBU) ACTION REQUEST: Post requests Department guidance in responding to the feedback requested in paragraph 2.  
Bradtke